SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. ~~451~~ ~~462~~ 22

THE LACKAWANNA IRON AND COAL COMPANY ET AL., PETITIONERS,

versus

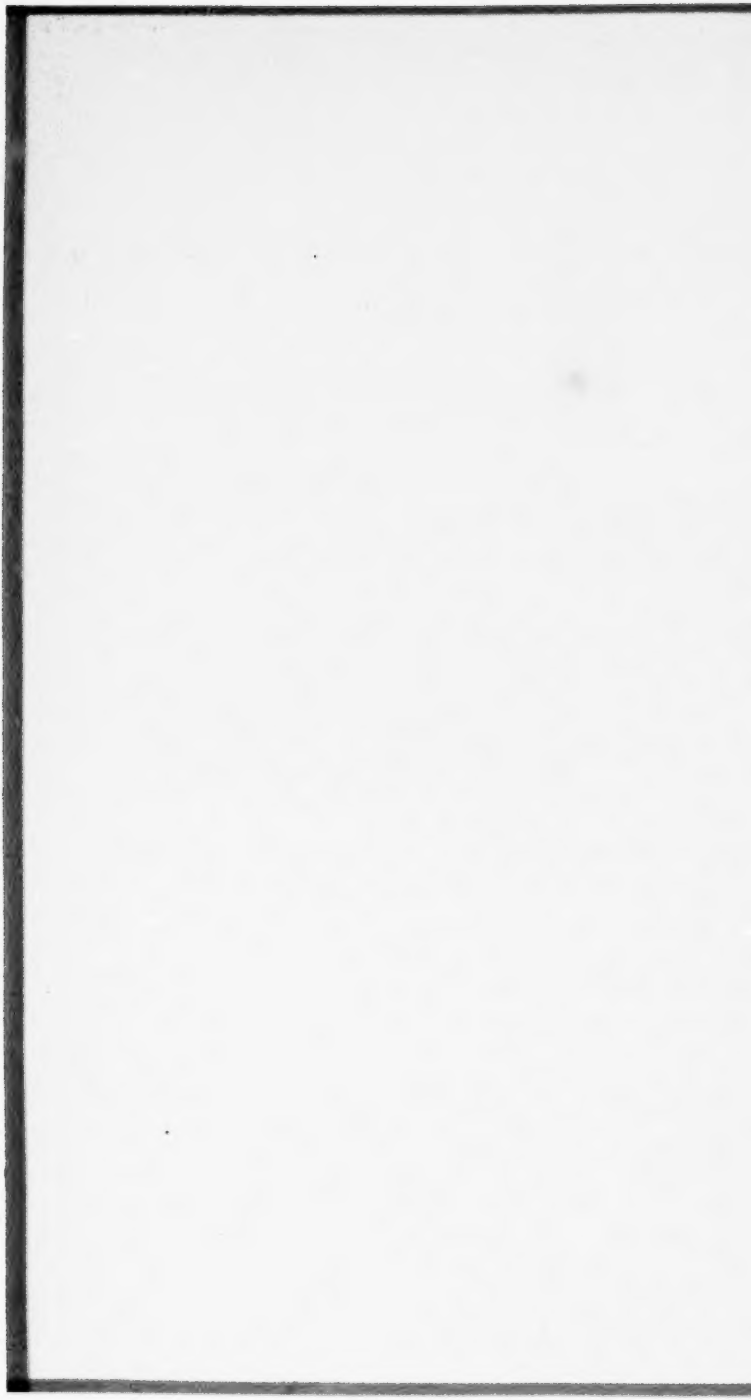
THE FARMERS' LOAN AND TRUST COMPANY ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

E. B. KRUTTSCHNITT,
E. H. FARRAR,
B. F. JONAS,
H. T. GURLEY, J. Hurley Ashton

Solicitors and of Counsel for Lackawanna Iron and Coal Company, and for Pacific Improvement Company.

Thomason, Print., 526 Natchez Street, N. O.



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THE FARMERS' LOAN AND TRUST COMPANY ET AL., RESPONDENTS.

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To the Honorable the Justices of the Supreme Court of the United States of America:

The petition of the Lackawanna Iron and Coal Company, a corporation organized under the laws of the State of Pennsylvania, and a citizen of said State, and of the Pacific Improvement Company, a corporation organized under the laws of the State of California, and a citizen of said State, respectfully represent to your Honors, as follows:

I.

That on the 26th day of April, 1883, the said Lackawanna Company entered into a contract, in writing, with the Houston and Texas Central Railway Company, a cor-

poration organized under the laws of the State of Texas, and having its principal place of business at Houston, in said State, pursuant to which contract it delivered to said Railway Company five thousand and nine (5009) tons of 56-pound steel rails during the months of June, August and September, 1883, at the price of $39.50 per ton. Pursuant to the terms of the contract, notes were issued in payment of these rails, aggregating in amount, with interest to their maturities, $201,346.64; but which notes were from time to time renewed until they were reduced to eight in number, maturing at dates between January 20th, 1885, and April 24th, 1885, and aggregating in amount $118,000. (Master's Report, R. pp. 651-2).

II.

Under another contract entered into between the Lackawanna Company and the said Railway Company on the 30th day of October, 1883, the Lackawanna Company delivered to said Company 8552 tons of 54 lb. steel rails during the months of February, March, April and May, 1884, the purchase price of which rails, evidenced by promissory notes maturing at different dates during the months of February, March, April and May, 1895, amounted to $327,175.50. (Master's findings, R. pp. 653-4).

III.

Of the rails furnished under the first of said contracts, and under a contract prior in date to said first contract, a portion was laid upon the tracks of the railway of the Waco and Northwestern Division of said Houston and Texas Central Railway Company. Said portion was suffi-

cient to lay 6.2 miles of said railway of said division, and was laid upon the same; and although it is impossible to show exactly what proportion of said rails were furnished under each of said two contracts, it is fair and equitable to prorate said rails between said two contracts, for the reason that the quantity of rails furnished under the said prior contract and under said contract of April 26th, 1883, was about equal, and that said Waco and Northwestern Division was run as a part of the general railway system of the Houston and Texas Central Railway Company, so that it is, in many matters, including the one now under consideration, impossible to separate its accounts from those of the rest of the system. The original contract price of the 5009 tons of rails furnished under said contract of April, 1883, was $197,855.50, which was reduced by payments to $118,000, as aforesaid; the said rails weighed 56 pounds to the yard, so that the rails laid on 3.1 miles of road amounted to 272.8 tons, which, at the contract price of $39.50 per ton, were worth $10,775.60. (Master's Report, R. p. 655).

The *pro rata* of the payments made under said contract of April 26, which would be imputable to said amount of $10,775.60, is $4449.09, and reduces the said amount to $6426.51, which is the balance due upon the contract price and value of the rails furnished by the Lackawanna Company under the said contract of April 26, and laid upon the railways of the Waco and Northwestern Division of the Houston and Texas Central Railway Company.

IV.

Of the rails furnished under the second of said contracts,

viz: the one of October 30, 1883, an amount sufficient to lay 30.8 miles was used upon the railways of the Waco and Northwestern Division of the Houston and Texas Central Railway. The contract price of the rails was $36.60 per ton; 84.86 tons of 54-pound rails are needed to lay one mile of track, so that the value of the rails delivered under said last-named contract, and laid on said Division, was, at the contract price, ~~$90,200.64~~ $95,660.98. (Master's Report, R. pp. 655, 656).

V.

At the time when the Lackawanna Company made the contracts and furnished the rails aforesaid, the condition of the track of the defendant Company was such that the demand for new rails upon the most worn portion of the same was practically imperative. The road north, from Houston, for 90 miles, was completed between 1857 and 1861, and thence northward to Denison between 1867 and 1872. The Waco and Northwestern Division was completed about 1875. The condition of the road was bad. There was continual breakage of rails and wreckage of trains; the track was unsafe, and was generally so regarded not only by railroad men, but by the traveling public; the damage to merchandise, rolling stock, etc., was continuous, and new rails were absolutely essential for the preservation of human life, the loss of which was liable to occur at any moment. Both buyer and seller expected the rails to be paid for from the current earnings of the railway. The sale was made without any stipulation for security to be given by the said Railway Company, or for payment out of any particular fund, or in any particular

way. (See Master's Report, Rec. pp. 656-7, differing slightly but not substantially from this statement).

The rails supplied under these contracts were laid in the tracks of the said Railway Company as above stated. (See Master's Report, Rec. *locis citatis*).

VI.

About nine months after the last of these rails were delivered, a Bill of Complaint was filed in the United States Circuit Court for the Eastern District of Texas by the Southern Development Company, praying, among other things, for the appointment of Receivers to all the railways of the Houston and Texas Central Railway Company (Master's Report, R. pp. 653 and 658), including the railways of said Waco and Northwestern Division.

Upon this bill, Benjamin G. Clarke and Charles Dillingham were appointed Receivers on the 21st day of February, 1885. This bill was filed by the Southern Development Company, seeking a marshaling of the assets of the said Railway Corporation, and a declaration that the claim of said Company was secured by a lien upon the net earnings of the Railway Company, and upon all of its property, superior in rank to the mortgage bonds. It was filed by the Southern Development Company in its own behalf, and in behalf of all other persons similarly situated, who might intervene to protect their own interests. The Lackawanna Company did intervene, praying substantially for the same relief as is prayed for by its intervention in Cause No. 227 of the docket of the United States Circuit Court for the Eastern District of Texas, hereinafter more fully referred to. (Master's Report, Rec. pp. 659-668).

The Bill of Complaint of the Southern Development Company was, on the 27th day of May, 1886, dismissed upon demurrer, without prejudice to the rights of complainants to assert their claims, if any they had, in such manner as they might be advised; but prior to the dismissal of said bill, Nelson S. Easton, James Rintoul and Charles Dillingham were appointed Receivers of the properties of the said Railway Company, including the said Waco and Northwestern Division, under three bills filed by various mortgage creditors, and which bills are generally known as Bills Nos. 198, 199 and 201 of the Chancery Docket of the Circuit Court of the United States, for the Eastern District of Texas. (Master's Report, R. p. 662).

VII.

Clarke and Dillingham, Receivers, turned over all the property in their possession to Easton, Rintoul and Dillingham, as Receivers, on the 10th of July, 1886, and these Receivers remained in possession of the property until December 7th, 1888, or thereabouts, when Easton and Rintoul were relieved from further duty, and Dillingham continued as sole Receiver. (Master's Report, R. p. 663).

The mortgages declared upon in the Causes Nos. 198, 199 and 201 were foreclosed by final decree entered in Consolidated Cause No. 198, under which number the three causes, together with others, had been consolidated, and under this decree all the property of the Railway Company was sold on the 8th of September, 1888, including the property of the Waco and Northwestern Division of the Houston and Texas Central Railway, which property, however, was sold subject to the mortgage forming the subject

matter of the bill of foreclosure of the Farmers' Loan and Trust Company, filed under the No. 227 of the docket of the United States Circuit Court for the Eastern District of Texas, which will be hereinafter more fully referred to, and subject, also, to the right which the Court reserved by its decree to charge upon the property, or any part thereof, the payment of any amount that might be found to be due and payable by reason of intervening petitions theretofore filed in said cause, and to be entitled to priority over the mortgage debts referred to in the decree. (Master's Report, R. p. 663).

The Lackawanna Company had, long prior to said decree, filed its petition of intervention in said Cause No. 198, praying substantially for the same relief as it had prayed for in its petition in Cause No. 185, and praying substantially for the same relief as it prays for in its petition of intervention in said Cause No. 227. (Master's Report, R. pp. 616 *et seq.*)

VIII.

Subsequently to the decree in said Cause No. 198 and to the sale made thereunder, the Lackawanna Company, on the 20th day of April, 1889, filed its petition in said Cause No. 198, asking that the Receivership therein should continue and remain over the property then in the possession of the Court, being the property now in the hands of the Receiver in said Cause No. 227, until the claims and demands of the Lackawanna Company should have been finally decreed upon, and if decreed in its favor, should have been finally paid and settled; and, further, praying the Court to render a preliminary order staying the order

which had theretofore been rendered, directing the delivery of the property to one George E. Downs, who had become the purchaser thereof, and directing the Receivers not to deliver the property to any purchaser until after the final hearing of the matter of said petition. (Master's Report, R. p. 675).

On this petition an order was rendered directing Downs and the Farmers' Loan and Trust Company to show cause why the relief prayed for should not be granted; and further directing the Receiver to retain possession of the property until the further order of the Court; and further ordering that the Receivership which had theretofore been ordered in Cause No. 227 should be concurrent with the original Receivership ordered in Cause No. 198, and that the Receiver should keep separate accounts of the earnings and expenses of the Waco and Northwestern Division of the Houston and Texas Central Railway Company. (Master's Report, R. p. 675).

It will thus be seen that ever since the Lackawanna Company filed its intervention in Cause No. 185, on the 12th day of September, 1885, the Lackawanna Company has at all times had an intervention pending in the matter of the Receivership of the Waco and Northwestern Division of the Houston and Texas Central Railway Company in every phase which that litigation has assumed. It will be seen that the Receivership ordered in Cause No. 198 has been continued concurrently with the Receivership in Cause No. 227, down to the present day. Thus, any intimation of laches, or of sleeping upon rights, is conclusively disproved, in so far as the conduct of the Lackawanna Company, itself, is concerned.

IX.

That the Southern Development Company filed its said Bill in suit No. 185 of the docket of the United States Circuit Court for the Eastern District of Texas on the 16th day of February, 1885. It filed an Amended and Supplemental Bill on the 18th day of April, 1885, after the appointment of Receivers. Prior to the filing of this Amended Bill, on March 31, 1885, the Farmers' Loan and Trust Company filed its petition in said Cause No. 185, praying to be made a party thereto, averring among other things that it was trustee under several different mortgages executed by the defendant Railway Company, and naming among others the mortgages subsequently sued upon in Cause No. 227. The prayer of the petition was granted on April 6, 1885; the Farmers' Loan and Trust Company was allowed to beome a defendant in said suit No. 185, with a proviso that it might demur, plead or answer on or before the Rule Day in June, 1885. On June 15, 1885, pursuant to this leave, the Farmers' Loan and Trust Company answered both the Original and Supplemental Bill of the Complainant; the averments of said answer are all defensive, and this answer, with the petition praying to be made a party defendant, are the only pleadings and appearance made by the Farmers' Loan and Trust Company in Cause No. 185, and it does not appear from said answer that the Farmers' Loan and Trust Company, as trustee for any of the mortgages mentioned in said answer, either demanded of the Court that the Receiver should hold the property for said trustee, or in any other manner demanded affirmative relief under any of the mortgages under which it was a trustee. (Master's Re-

port, R. pp. 671-2). Its appearance in said Cause No. 185 was simply that of a defendant in opposition to the rights asserted in the original and supplemental bill of complaint.

X.

The bill in Cause No. 195 was, as aforesaid, dismissed upon demurrers, which demurrers were filed on October 5th, 1885, by Easton and Rintoul, Trustees, under various mortgages. This dismissal occurred May 27th, 1886 (R. p. 672); but on May 26th, 1886, prior to the entry of the order of dismissal, on motion of the defendant, the Houston and Texas Central Railway Company, an order was rendered in six causes, numbered respectively 183, 184, 188, 198, 199 and 201. This order was rendered upon consent of all parties in open Court. It first provided that no further proceedings should be had in Causes Nos. 183, 184 and 188, without notice to the Railway Company. It further provided that Causes Nos. 198, 199 and 201 should be consolidated under the No. 198, and under the name and style of Nelson S. Easton and James Rintoul, Trustees, and the Farmers' Loan and Trust Company, Trustee, against the Houston and Texas Central Railway Company, and Benjamin A. Shepard, Trustee, Consolidated Cause; that in said cause Easton and Rintoul should stand as complainants, as trustees under the mortgages or deeds of trust made by the defendant Railway Company, and bearing dates respectively July 1st, 1886, and December 21st, 1870; that the Farmers' Loan and Trust Company, expressly assenting thereto, should stand as complainant under the mortgages or deeds of trust made by the defendant Railway Company, bearing dates respectively June

16th, 1873, October 1st, 1875, and April 1st, 1881, and that Benjamin A. Shepard should stand as defendant, as trustee under the mortgage or deed of trust made by the defendant Railway Company, bearing date May 7th, 1877; that the bills filed in said Causes Nos. 198, 199 and 201, should stand as bills in the Consolidated Cause, and might be amended by either complainant, as they might be advised, by the August Rule Day, and that any party might file an answer to such original or amended bills as he might be advised within thirty days after said August Rule Day. No other action was taken in Causes Nos. 183, 184 and 188, after the order above mentioned, and it is unnecessary to further allude to them. Consolidated Cause No. 198 proceeded to final decree, and the three mortgages declared on therein were in all things foreclosed. (Master's Report, R. p. 673).

The Farmers' Loan and Trust Company, in its capacity as Trustee, in the mortgage declared upon in Cause No. 227, expressly assented to stand as complainant in said Cause No. 198, but filed no Bill of Complaint therein, in its said capacity, and the Bill of Complaint in Cause No. 227 was not filed until long after final decree in Cause No. 198.

XI.

Prior to March, 1887, Easton and Rintoul filed a petition in Cause No. 198, seeking an order directing the Receivers, out of surplus earnings of the Railway Company in their hands, to pay the interest coupons due upon mortgages whereof they were trustees.

On March 21st, 1887, the Farmers' Loan and Trust Company filed an answer to the said petition of Rintoul

and Easton, wherein and whereby the Farmers' Loan and Trust Company, as Trustee, under the Waco and Northwestern First Mortgage, being the mortgage forming the subject matter of Bill No. 227, prayed the Court that any order which should be rendered in Cause No. 198, directing the payment by the Receivers out of the surplus of net earnings in their hands of any coupons falling due upon mortgages secured by any of the trust deeds by said Railway Company, might also order and provide for payment by the Receivers out of the surplus of net earnings in their hands of the two coupons due upon the Waco and Northwestern Division first mortgage, as well as upon the said other first mortgages. (Master's Report, R. p. 673).

The application of Easton and Rintoul, as also the application of the Farmers' Loan and Trust Company, for the payment of interest coupons, on the bonds secured by first mortgages or deeds of trust, described in the Bills of Complaint in said Consolidated Cause, came on to be heard on the 27th day of April, 1887, when an order was rendered by the United States Circuit Court for the Eastern District of Texas, that the coupons due January 1, 1885, and July 1, 1885, upon the first mortgage bonds of the Waco and Northwestern Division of the Houston and Texas Central Railway should be paid, as provided in the order, with interest. The two coupons were paid pursuant to this order. The order expressly declared that it was:

"Without prejudice to the rights of defendant or any intervenor in this cause, or any final decree to be rendered in the same, nothing herein being decided as to the merits of the claim of the defendants, or of intervenors, and this order not in any manner stopping or affecting the rights of any party or intervenors in this cause."

The Farmers' Loan and Trust Company, as Trustee upon this same first mortgage of the Waco and Northwestern Division, also filed petitions in the United States Circuit Court for the Eastern District of Texas, on the 6th day of November, 1888, and on the 20th day of November, 1888, for payment of the remaining coupon interest due upon the first mortgage of the Waco and Northwestern Division, upon which petitions no order was ever rendered. (Master's Report, Rec. p. 674).

XII.

By the final decree, rendered in Cause No. 198 on the 4th day of May, 1888, foreclosing the various mortgages sought to be foreclosed in said cause, the United States Circuit Court for the Eastern District of Texas expressly reserved the right to charge the property, under said decree ordered to be sold, with any amounts that it might decree in favor of any interventions then on file, and the intervention of the Lackawanna Company was on file at the time of said decree. (Master's Report, R. p. 674).

XIII.

The amount of the coupons and interest paid to holders of first mortgage bonds of the Waco and Northwestern Division, under the orders of Court above referred to, including the interest paid pursuant to said orders, amounted to $91,371. (R. p. 680).

XIV.

During the years 1883 and 1884, while the rails were being furnished to the Houston and Texas Central Railway Company, that Company paid out $2,386,400 in inter-

est upon its bonded indebtedness; which amount, less $1,043,198.27, which was borrowed for interest purposes, in those years, was paid from income or current earnings. Out of this amount $159,600 was paid as interest on the first mortgage bonds of the Waco and Northwestern Division, being the bonds forming the subject matter of the Bill of Complaint in Cause No. 227. (Master's Report, R. p. 676).

XV.

During the Receivership of Clarke and Dillingham, in Cause No. 185, they received from the operations of the railway of the defendant Company a total of.. $4,902,218 45
Their expenditures for operating expenses, taxes, etc., for the same period, amounted to.. 3,479,076 29

Leaving a net balance from the operations of the railways of the Houston and Texas Central Railway Company, from February 23, 1885, to July 10, 1886, in cash, of ..... $ 423,142 16

These figures are the result of a consolidation of the figures given at p. 666 of the Record in the Master's Report.

XVI.

The Receivers, in Suits Nos. 185 and 198, Clarke, Dillingham, Easton and Rintoul, during their administration, expended a sum total of $1,538,116.38 outside of operating expenses, all of which, except the sum of $23,274.20, clearly went into the pockets of the mortgage creditors, or was expended in betterments upon the properties mortgaged to them. In other words, a total of $1,512,842.18 inured out of the revenues of the Receivership to the benefit of the mortgage creditors. (Master's Report, Rec. p. 667).

XVII.

The accounts of the Railway Company were not kept in such a manner as to distinguish between earnings and expenses on the Waco and Northwestern Division, and those derived from the other divisions of defendant Company's Railway. (Master's Report, Rec. p. 680).

XVIII.

The properties mortgaged to the Farmers' Loan and Trust Company, under the mortgages sought to be foreclosed in this cause, were the lines of the Houston and Texas Central Railway, from Bremond to Ross, commonly known as the Waco and Northwestern Division, extending a distance of fifty-eight miles, whilst all the roads of the Houston and Texas Central Railway Company, including the Waco and Northwestern Division, amount to a total mileage of 521¾ miles. (Bill of Complaint, R. p. 9). In other words, the Waco and Northwestern Division constitutes 11 13-100 per cent. of the whole system.

XIX.

The indebtedness due by the Houston and Texas Central Railway Company to the Lackawanna Company was liquidated by judgment of the District Court of Dallas County in suit instituted by the Lackawanna Company against the defendant Railway Company, at the sum of $555,914.25, with interest at eight per cent. per annum from May 17th, 1889 (Master's Report, R. p. 676), and upon this judgment execution issued August 19th, 1889, which was returned by the Sheriff of Dallas County, not executed, there being no property found in Dallas County, subject to execution. (Master's Report, R. p. 670).

XX.

On the 6th day of April, 1889, the Farmers' Loan and Trust Company, as complainant, filed a Bill of Complaint against the Houston and Texas Central Railway Company and others, seeking the foreclosure of the first mortgage granted by the latter Company upon the division of its railways, known as the Waco and Northwestern Division. (Rec. pp. 8 *et seq.*) This suit is numbered 227 of the docket of the U. S. Circuit Court for the Eastern District of Texas.

XXI.

In this proceeding the Lackawanna Iron and Coal Company filed a petition of intervention, the object of which petition was to obtain the recognition of the indebtedness due to it by the Houston and Texas Central Railway Company, as aforesaid.

This petition (R. pp. 623 *et seq.*) asked that an account might be taken, under the direction of the Court, as to the dates and amounts of money paid by the defendant Railway Company to any of the mortgagees in the various trust deeds, described in the petition, showing particularly the issue of bonds upon which such interest was paid; and what proportion of the amounts so paid were paid out of current revenues of the Company, in the absence of earnings, and what amounts were so paid out of net earnings of the defendant Railway Company; and particularly so as to show what amounts and proportions were so paid out of the net earnings of those portions of the railway of the defendant Railway Company, described in the Bill of Complaint of the Farmers' Loan and Trust Company, herein-

above referred to; that an account might be taken showing the proportion of steel rails furnished by petitioner to the defendant Railway Company, used upon the railways described in the Bill of Complaint; and that the account to be taken should also show all receipts and expenditures made by the Receivers, in whose hands the property had been placed under proceedings which will be hereinafter at greater length detailed, and which account should be taken in such manner as to show the dates when the expenditures were made, and the character of the expenditures, and in such manner as to show whether the expenditures were made for operating and running expenses, or for extraordinary repairs, betterments and improvements of the property, and for the payment of fixed charges upon the same.

Said petition further prayed that for the amounts due on such accounting to petitioner and equitably chargeable upon the railways described in the Bill of Complaint in said cause, there might be a decree against the defendant Railway Company, and against all of the parties complainant and defendant, decreeing the sum so due to be liens upon the net earnings of the Railway Company, and especially upon those portions of said net earnings which have accrued or may accrue from the railways described in the Bill of Complaint, both those accrued prior to the Receivership in Cause No. 185, and those accrued and to accrue during the Receivership in Cause No. 198; and upon all of the property of the Railway Company, superior in rank to the claims of the trustee and of the holders of mortgage bonds and coupons issued under the deed of trust sought to be foreclosed by the Farmers' Loan and Trust Company; that the net earnings of the railway described in the Bill of

Complaint should be first devoted to the payment of the amounts so decreed, and, if they should prove insufficient to pay the amounts, then that the Court should decree the payment of said amounts out of any proceeds of sale of the property of the Railway Company to be made under final decree.

XXII.

To this petition an answer was filed by the Farmers' Loan and Trust Company, which covers ten pages of the Record (pp. 635 *et seq.*), which is substantially a denial of all equities of the Lackawanna Iron and Coal Company, and of the facts upon which the same are alleged to exist.

Moran Bros. and Henry K. McHarg, bondholders, subsequently intervened and pleaded that the petition of intervenors was barred by the Statute of Limitations, in addition to which they adopted the answer of the Farmers' Loan and Trust Company. (Rec. pp. 647-8).

XXIII.

The Pacific Improvement Company, as assignee of the Lackawanna Company, was, by order of Court, and upon its petition, made a co-petitioner with the Lackawanna Company. (R. p. 646).

XXIV.

The petitions, with the answers of the Farmers' Loan and Trust Company, and of Moran Bros. et als., intervening bondholders (R. pp. 635 and 647), was referred to William L. Prather as a special master "to take the accounts prayed for, and to investigate, find and report upon the facts as to the subject matter of said petition, and of the answers thereto."

XXV.

The facts of the case were found by the Master, as will be seen from his report, which will be found in the printed record of the United States Circuit Court of Appeals for the Fifth Circuit, of which copies are filed with and as part of this petition. The references hereinabove made to the record in support of the allegations of fact have been taken from said report, which gives the facts of the case in a succinct form, and which report was not excepted to by either party.

Upon the facts, as found by the Master, the intervention of the Lackawanna Iron and Coal Company came for trial before the Honorable the Circuit Court of the United States for the Eastern District of Texas, which Court dismissed said petition. (See Rec. p. 681).

XXVI.

The cause was taken by appeal to the Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decree of the lower court, as will be seen from a certified copy of said opinion. (R. pp. 844 *et seq.*)

Petitioners applied for a rehearing in said Court, which was refused. (R. p. 843). The propositions submitted to said Circuit Court of Appeals, under proper assignments of error, were the following, to-wit:

A.

That the claim of the Lackawanna Company is one of the character repeatedly recognized by the Supreme Court of the United States as a charge in equity on the continuing income of a railway company as well that which comes

into the hands of the Court after a receiver is appointed as that before, and that so far as this current expense creditor is concerned, the Court should use the income of the receivership in the way in which the Company would have been bound in equity and good conscience to use it, if no change in the possession had taken place; and further, that if the income has been diverted from the payment of current income creditors to the payment of mortgage creditors, or to the improvement of the mortgaged property, the current income fund, to the extent to which it has been depleted, will be restored out of the proceeds of sale of the mortgaged property.

B.

That the Farmers' Loan and Trust Company and the beneficiaries under its trust never had a lien upon any of the earnings of the Waco and Northwestern Division of the Houston and Texas Central Railway Company, and they have no lien upon any such income now in the possession of the Circuit Court.

C.

If neither party has, nor at any time during the litigation under consideration had, a lien on the income of the railways mortgaged in this case, then the Court will proceed upon the principle that equality is equity, and will distribute the income ratably among all the creditors of the defendant Railway Company before the Court.

XXVII.

Said Honorable Circuit Court of Appeals, in its opinion,

held that the claim of petitioners is not one of the character recognized by this Honorable Court as a charge in equity on the continuing income of a railway company in manner and form, and to the extent set forth in the first of the foregoing propositions, and that the claim of petitioners was entitled to no priority under the doctrine laid down in the case of *Fosdick vs. Schall*, and a long line of decisions following, affirming, explaining and modifying said decision; and said Honorable Circuit Court of Appeals did not, by its opinion, pass upon either of the other points hereinabove set forth.

XXVIII.

The two important questions of law involved in said cause are:

(*a*) Whether or not a claim for rails furnished to a railway company, for the purpose of keeping it up as a going concern at a time when but for such furnishing its operations would practically cease, is a claim of the character which will, under the doctrine in *Fosdick vs. Schall*, be granted priority on the continuing income of a railway company as well that which comes into the hands of the Court after a receiver is appointed as that before, in the manner and form and to the extent set forth in the first of the said propositions; and whether this claim, if it existed, is lost by the acceptance of promissory notes and the giving of time to the embarrassed company.

(*b*) Whether or not a mortgagee has any lien upon the revenues of the mortgaged property accruing prior to the filing of a foreclosure bill, and during a receivership pro-

voked by others, and in proceedings wherein such mortgagee is a defendant only and not a complainant.

That the Honorable the Circuit Court of Appeals did not discuss this second question in its opinion, but by affirming the decree of the lower court necessarily affirmed the existence of such a lien.

XXIX.

Now, your petitioners aver that they are advised by counsel that this Honorable Court has never yet in any case directly passed upon the questions constituting the distinguishing features of this case and controlling its correct decision; that your petitioners are further advised that the scope and extent of the doctrine announced in the case of *Fosdick vs. Schall* will, within a very few weeks after the opening of the October Term of this Honorable Court, in 1897, undoubtedly become the subject matter of an adjudication by this Honorable Court in a cause wherein it has heretofore issued a writ of *certiorari* to the Honorable the Circuit Court of Appeals for the Fifth Circuit, said cause being the cause entitled *Rowena M. Clark et al. vs. The Central Railroad and Banking Company, of Georgia, et al.*, No. 100 of the Docket of this Honorable Court, for the October Term, 1897.

Your petitioners are further advised that the Honorable the Circuit Court of Appeals for the Fourth Circuit has, in the cause entitled *Southern Railway Company vs. Carnegie Steel Company, Limited*, reported in the *76th Federal Reporter, 492*, decided a cause in accord with the contentions of petitioners, and in diametrical opposition to the decision of the

Honorable the Circuit Court of Appeals for the Fifth Circuit, upon the claim of your petitioners.

That said cause, so decided by said Circuit Court of Appeals for the Fourth Circuit, is, as to nearly every crucial fact, an exact duplicate of the cause now presented to your Honors in this petition, and is its exact duplicate in law. Both causes involved two successive receiverships, to-wit: First, a receivership instituted, not at the suit of a mortgagee, but at the instance of other creditors, to protect the property from disruption and hold it together; and thereafter a supervening receivership, provoked by bondholders, and to which the first receivership was made to account. Both causes involved a claim for steel rails, involved a consideration of the effect to be given to the fact that promissory notes were given in evidence of a credit extended for said rails; involved renewals of the notes so given, and involved the alleged laches of the petitioners.

That your Honors have heretofore issued a writ of *certiorari* to the said Honorable the Circuit Court of Appeals for the Fourth Circuit, in the matter of the *Southern Railway Company vs. The Carnegie Steel Company, Limited*, which cause is now pending upon the Docket of this Honorable Court and is numbered 278 upon the Docket for the October Term, 1897.

Petitioners aver that the questions involved in this cause are of very great importance, and of a degree of general importance which should, your petitioners respectfully submit, obtain from your Honors a review of the said decision of the said Circuit Court of Appeals for the Fifth Circuit by, and on *certiorari*. That such hearing on

certiorari of this cause is essential, in order to maintain a uniformity of jurisprudence between different Circuit Courts of Appeal—the decisions of said Circuit Court of Appeals for the Fourth Circuit and said Circuit Court of Appeals for the Fifth Circuit being, as aforesaid, in diametrical opposition to each other.

Petitioners further aver that this application is prosecuted with due and with all possible diligence; that the decision of the said Honorable the Circuit Court of Appeals for the Fifth Circuit, of which your petitioners seek to obtain a review by *certiorari*, was rendered by said Court on the 25th day of February, 1897. That an application for a rehearing in said cause was, within the delay fixed by the rules of the said Honorable Circuit Court of Appeals, filed by petitioners on the 16th day of March, 1897. (Rec. pp. 841 *et seq.*) That the said application received the consideration of the said Circuit Court of Appeals, and was not denied until the 10th day of June, 1897, as will appear from the record herein. (Rec. p. 843).

That the act of said Circuit Court of Appeals for the Fifth Circuit, in holding said cause under consideration, although an act performed in the proper and orderly performance of the judicial duties of said Circuit Court of Appeals, produced the result that the decree of the said Honorable the Circuit Court of Appeals, although rendered several weeks prior to the adjournment of this Honorable Court in May, 1897, did not become final until after the said adjournment of this Honorable Court; that petitioner had therefore not exhausted its remedies in the lower court until subsequently to the adjournment of this Court in May, 1897, and that this petition is filed during the sum-

mer vacation of 1897, in order that it may be presented to your Honors at the opening of the October Term, 1897.

That owing to the inability of petitioners to present this application to your Honors immediately after the refusal of said rehearing, by reason of the fact that this Honorable Court was in vacation as aforesaid, the mandate of said Honorable Circuit Court of Appeals for the Fifth Circuit has issued to the Circuit Court of the United States for the Eastern District of Texas, and that petitioners desire that said mandate be recalled, as hereinafter prayed for.

Petitioners file herewith a copy of the opinion of the Court of Appeals (Rec. pp. 844 *et seq.*), copies of the record and of the briefs filed by them in said Court, and also a brief in support of this petition.

Wherefore, petitioners pray that a writ of *certiorari* may issue to the said Honorable the Circuit Court of Appeals for the Fifth Circuit to bring up, for review before your Honors, the judgment and decree of said Court, in the cause entitled *Lackawanna Iron and Coal Company et al., Appellants, vs. Farmers' Loan and Trust Company et al., Appellees,* No. 593 of the Docket of said Honorable Court; and that your Honors will issue an order directing said Honorable Circuit Court of Appeals to recall its mandate, and to hold the same subject to the orders and decrees of this Honorable Court, and until your Honors can hear and pass upon said writ of *certiorari;* and your petitioners pray, that on the hearing of said writ of *certiorari,* so to be issued, your Honors do quash and reverse the decree of said Circuit Court of Appeals for the Fifth Circuit, and do render a decree that petitioners be paid out of the funds in the

custody of the Court the two sums of sixty-two hundred and forty-six 51-100 dollars ($6246.51), and ~~ninety-one~~ must have thousand six hundred ~~and~~ 97-100 dollars ($91,600.97) ~~three hundred 61-100 dollars ($90,300.61)~~, with interest at six per cent. per annum upon both of said amounts, from May 1st, 1885, until paid; or, if this Honorable Court should conclude that neither the Lackawanna Iron and Coal Company, nor the Farmers' Loan and Trust Company, as Trustee, has established any lien in the premises, then that this cause be remanded to the said Honorable the Circuit Court of Appeals, with instructions to remand the cause to the Circuit Court, and with instructions to the latter Court to distribute the income in the hands of said Circuit Court, after payment of all costs and expenses, *pro rata* between the different creditors of the Houston and Texas Central Railway Company before the Court; and petitioners pray for all such further and general relief in the premises as the case may require, and as in their petition of intervention prayed for, and as to your Honors may seem meet and just.

Respectfully submitted,

E. B. KRUTTSCHNITT,
E. H. FARRAR,
B. F. JONAS,
H. T. GURLEY,

Solicitors and of Counsel for Lackawanna Iron and Coal Company, and for Pacific Improvement Company.

STATE OF NEW YORK,
County of New York,
City of New York.

Personally came and appeared before me, the undersigned authority Edwin J. Hatfield who, being duly sworn, deposes and says, that he is the President of the Lackawanna Iron and Coal Company, one of the petitioners in the above petition, and that all the facts, matters and things therein set forth are true to the best of his knowledge, information and belief.

E. J. Hatfield
of the Lackawanna Iron & Coal Co

Sworn to and subscribed before me this 2d day of Sept. 1897.

(Seal) Edwin J. Conway,
Notary Public N. Y. County.

STATE OF NEW YORK,
County of New York,
City of New York.

Personally came and appeared before me, the undersigned authority Thos. H. Hubbard who, being duly sworn, deposes and says, that he is the Att'y in fact of the Pacific Improvement Company, one of the petitioners in the above petition, and that all the facts, matters and things therein set forth are true to the best of his knowledge, information and belief.

Thos. H. Hubbard

Sworn to and subscribed before me this 3 day of Sept. 1897.

(Seal) William Sullivan.
Notary Public, N. Y. Co.